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C O N F I D E N T I A L SECTION 01 OF 03 TEGUCIGALPA 001644

SIPDIS

STATE FOR EB/CBA, EB/IFD, WHA/EPSC, L/CID, AND WHA/CEN
COMMERCE FOR MSELIGMAN
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STATE PASS USTR

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SUBJECT: DOLE FILES \$137 MILLION SUIT AGAINST HONDURAS
ALLEGING DOUBLE TAXATION; SEEKS USG SUPPORT

Classified By: Classified by EconChief PDunn for Reasons 1.5(e)

¶1. (U) This is an action request for EB/IFD and L/CID --
please see paragraph 11.

¶2. (C) Summary: Following the rejection of its two appeals of a recent \$137 million tax judgment against it by the GOH revenue authority, Dole sees little choice but to challenge the administrative ruling in court. Dole describes the case as clear double taxation of a stock swap that took place outside of Honduras and for which taxes have already been paid to the USG. The GOH sees instead a sale of Honduran assets by means of a stock swap, with large profits on which taxes are owed to Honduras. Dole is reviewing its options for actions to defend itself outside of Honduras, such as whether this ruling could be considered "de facto expropriation" and whether the U.S.-Honduras Bilateral Investment Treaty (BIT) could be invoked. This tax case involves extremely complex and legally technical issues and, unless otherwise instructed, Post intends to remain carefully neutral in this matter. End Summary

¶3. (C) U.S.-based tropical fruit producer Dole (which operates in Honduras under the name Standard Fruit Company) recently received a notice of tax judgment from the GOH tax authority (the DEI) in the amount of \$137 million for a 2001 transaction. According to Dole, a somewhat complex stock-swap arrangement involving three other offshore companies was used when Dole sold Honduran brewery Cerveceria Hondurena (CH) to SAB-Miller that year. The sale yielded significant profits for Dole, which reports paying \$173 million in taxes to the U.S. IRS. In the view of Dole's internal and external auditors (at the time Arthur Anderson), the U.S. was the proper taxing jurisdiction for the transaction, so no taxes were paid to the GOH.

¶4. (C) The GOH views the transaction differently, claiming that, whatever the mechanism invoked, at its heart this transaction was the sale of a Honduran asset at a profit, and therefore taxes on those profits are due to Honduras. The GOH calculates the taxes due at approximately \$50 million, with an additional nearly \$100 million in penalties and interest, for a total of \$137 million. If collected, this would reportedly be the largest single judgment in GOH history.

¶5. (C) Dole immediately appealed the judgment, considering it "wrong technically and legally" according to Dole Chief Financial Officer Joseph Tesoriero, who briefed Charge, ADCM, and EconChief on August 3. In his opinion, the transfer of shares outside of Honduras is not equivalent to a transfer of assets, as the GOH alleges. Dole's first appeal of the judgment, to the Executive Revenue Directorate (the DEI -- equivalent to the U.S. IRS) was rejected in July. Dole then invoked its right to a second appeal, to the Ministry of Finance. In only three days, the Ministry sided with the DEI, ruling that the taxes are indeed due.

¶6. (C) With Embassy assistance, Dole senior officials met with Minister of Finance William Chong Wong on August 3 to discuss the case. As Tesoriero noted to Chong, Dole does not want to find itself suing its host country, as that could poison relations for years to come. Chong told the executives that the administrative review had run its course and he could not arbitrarily reverse it, and that Dole must decide whether to challenge the administrative judgment in court within the stipulated 15-day window (which closes August 5). However, Chong also said the firm could file for an extraordinary review of the case. Because Chong is currently on leave from auditing firm Deloitte-Touche -- which is Dole's current outside auditor, but was not at the time of the 2001 transaction -- Chong has all but recused himself from the proceedings, delegating review of the case to Vice Minister Donald Dubon. Dubon has an extensive background in both tax matters and central banking, and it was he that concurred with the DEI judgment following Dole's appeal.

¶7. (C) Dole told Post it will file suit by August 5, but the firm is also debating internally whether to request the

extraordinary review offered by Chong. Dole executives note the benefits of keeping another channel of communications open, but expressed concern that the review process could distract Dole litigators or otherwise weaken its pending lawsuit. Dole President David H. Murdock will also seek a meeting with Honduran President Ricardo Maduro, who has already been briefed on this issue by Chong.

¶18. (C) Dole does not feel that the current tax suit is politically motivated, but is concerned that it is a "politically charged" issue, particularly in this Honduran election year. Chong agreed with this point, but expressed his inability to halt the case, noting that if he were to halt a high-profile case like this one, the assumption would be that he had been bribed to do so. In lieu of halting the case, Chong offered to arrange a meeting between Dole executives and the Attorney General. In a sidebar with Dole representatives following the meeting, DEI Director Jose Manuel Carcamo also broached the subject of a negotiated settlement of the tax bill. Dole reportedly did not explicitly reject the offer, but went to some pains to impress on the GOH that they had requested the meeting not out of weakness or a desire to settle, but rather out of what they hoped was a shared desire to avoid a difficult process of litigation. Dole also said that they are not a firm that seeks to avoid taxes, noting both that they had paid taxes on this transaction in the U.S. and that they had paid over \$90 million in corporate income taxes to the GOH over the previous ten years.

¶19. (C) Dole is also reviewing its options for actions to defend itself outside of Honduras. In particular, they are considering whether this tax ruling could be considered "de facto expropriation" and whether the U.S.-Honduras Bilateral Investment Treaty (BIT) could be invoked. (Note: There is no bilateral tax treaty between the two countries. End Note.) Dole General Counsel Michael Carver raised the possibility of a similar recourse to the Central America Free Trade Agreement (CAFTA). EconChief explained that CAFTA would not likely enter into force in time to offer a potential avenue to resolve this case. (Dole tax advisor Lorenzo Pineda -- a former head of the DEI himself -- estimates that Dole's court case could be completed by mid-October, and any subsequent appeal within two more months.)

¶10. (C) Asked what USG involvement Dole is seeking, Tesoriero requested: a USG expression of gratitude to Chong for agreeing to meet; encouragement of Chong's continued involvement in the case (despite his Deloitte ties); assistance in getting a meeting with the Attorney General; assistance in getting a meeting with Special Envoy Norman Garcia; and a USG opinion on recourse to the BIT and the other "outside" options under consideration.

¶11. (C) Action requested: Post seeks Department views on the viability of recourse to the BIT, international arbitration, or claims to de facto expropriation as potential future steps by Dole that could then require Post or broader USG involvement. Post would also welcome any views from L/CID regarding the merits of the case and suggested (or discouraged) Post actions. Post is not/not requesting assistance with arranging meetings with any GOH officials at this time.

¶12. (C) Comment: This case involves extremely complex and legally technical issues involving both international tax treatment and securities regulation. As such, Post is not qualified to express an opinion regarding the validity of Dole's complaints. We agree with Dole that the case does not seem to be politically motivated, nor has there been any evidence of corruption on either side. This appears to be an honest, if high-stakes, disagreement over a legal interpretation. For these reasons, and unless otherwise instructed, Post intends to remain carefully neutral in this matter, encouraging only a transparent, just, and timely resolution.

¶13. (C) Comment (cont'd): Post also points out that the GOH has long been encouraged by the International Monetary Fund, the USG, and other bilateral and multilateral donors to strengthen tax collection as a means to improve fiscal sustainability. A GOH move toward holding large firms accountable, if undertaken in compliance with appropriate regulations and practices, is an important step towards broader economic reform. That said, the decision to make an early example of a foreign firm is not an especially politically courageous one, and we will continue to urge the GOH to look to its own largest firms when seeking targets for audits. Whether Dole emerges victorious or not, Post will seek to leverage this case into future DEI actions to hold Honduran firms equally accountable. End Comment.

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